IN THE

Supreme Court of the United States

No. 28

October Term, 1947.

1948

JULIA ECKENRODE, Administratrix of the ESTATE OF JOHN HENRY ECKENRODE, Deceased,
Petitioner,

v.

PENNSYLVANIA RAILROAD COMPANY,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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OPINIONS BELOW.

The opinion of the District Court for the Eastern District of Pennsylvania (R. 149a) is reported in 71 F. Supp. 764. The opinions of the Circuit Court of Appeals for the Third Circuit (R. 184, 213) are reported in 164 F. 2d 481, 996.

JURISDICTION.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925; 28 U. S. C. A., Sec. 347 (a).

QUESTION PRESENTED.

Whether the Circuit Court of Appeals erred in affirming the entry of judgment for respondent where there was no evidence to sustain a finding that the engineer of respondent's train was negligent in not continuing to observe the flagman who was last seen by the engineer walking

away from the track on which the train was being operated, at a time when the flagman had no duties to perform in connection with the movement of the train and gave no indication that he would place himself in proximity to the engine which caused his death?

STATUTE INVOLVED.

Section 1 of the Federal Employers' Liability Act (Act of April 22, 1908, Chapter 149, as amended by the Act of August 11, 1939; 45 U. S. C. A., Section 51) provides:

> "Every common carrier by railroad . . . shall be liable in damages to any person suffering injury while he is employed by such carrier . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier . . . "

STATEMENT.

Petitioner's decedent, John Henry Eckenrode, was fatally injured on October 8, 1943, at 12:10 p. m. on respondent's tracks between Hastings and Cresson, Pennsylvania. The witnesses, all of whom were called by the petitioner, were in complete agreement concerning the facts of the accident. However, petitioner's brief contains such serious mistatements and distortions of the uncontradicted testimony that a full statement of the facts is required.

The deceased was the flagman on a coal-shifting train of the respondent, which was operating on the day in question between Cresson and Hastings, Pennsylvania (R. 10a, 11a). The weather was clear and dry (R. 9a, 54a, 101a). The engine had just drawn four cars from the Hastings Fuel siding on to the main track and coupled the four cars so drawn to eighteen cars standing on the main track (R. 11a, 12a, 60a, 61a). The deceased, in the performance of his duties, had thrown the switch and coupled the cars

in this operation (R. 61a) and, after the operation was completed, had returned to the caboose where it was his duty to remain during the movement in question (R. 13a, 62a, 76a, 86a, 117a).

After the coupling was effected, the engine was standing approximately at the Hastings Fuel siding switch, facing in the direction of the twenty-two cars intended to be pushed, and was connected to the last of these twenty-wo cars, with the caboose located behind the engine (R. 11a, 12a, 40a, 101a). Looking in the direction in which the engine was facing, the Hastings Fuel siding track diverged to the right from the main track, forming a narrow "Y" so that it ran in roughly the same direction as the main track but slightly down-grade, whereas the main track ran upgrade. The distance between the Hastings Fuel track and the main track increased gradually from the switch point (Defendant's Exhibits 1, 2 and 3; R. 142a, 143a). Respondent's fireman, Sunderlin, who was a qualified engineer, was operating the locomotive and the regular engineer was acting as fireman (R. 27a, 28a, 100a, 116a). After the locomotive started to push the cars up the grade on the main track, the deceased left the caboose and walked past the engine on the right or engineer's side (R. 42a, 51a, 63a, 81a, 106a, 107a, 118a). At this time, the engine had moved along the main track (the left arm of the "Y") approximately fifty feet beyond the Hastings Fuel switch (R. 118a) and the deceased was on the Hastings Fuel track (the right arm of the "Y") a distance estimated as between seven and twelve feet to the right of the engine and three to five feet below it (R. 58a, 64a, 86a, 87a, 118a, Defendant's Exhibits 1, 2 and 3, R. 142a, 143a). As the deceased walked past the engine, he and Sunderlin had a conversation which was described by Sunderlin, corroborated by Ingoldsby (R. 42a, 63a), as follows (R. 118a, 119a):

"THE COURT: Tell him exactly what he said, just exactly as you can remember.

THE WITNESS: He said: 'Big boy, if you can't push them cars up I will get the bar and bar them.'

Did you want me to tell everything?

THE COURT: Tell everything that was said.

THE WITNESS: I said: 'Bull shit on this junk.'

Q. What did he mean by 'the bar'?

A. It is in the cabin car for breaking things down or any repairs that have to be made around the train.

Q. A crow bar, isn't it?

A. Yes, a crow bar.

Q. Have you ever seen a trainman use a bar to help move an engine up a grade?

A. No, sir.

Q. He was joking, was he not?

A. Yes, sir, so was I."

There was not a word of evidence to indicate that Eckenrode ever returned to the caboose in order to obtain a bar with which to push the engine. After their conversation the deceased was not again seen by Sunderlin until after his death (R. 107a). Deceased then walked on, beyond the moving train, on the Hastings Fuel track and, at a point approximately one hundred feet beyond the place where he had passed the slowly moving engine, turned to his left and started diagonally toward the embankment between the two tracks (R. 14a, 81a, 82a, 83a, 85a, 88a, 106a, 121a). In some unexplained manner, his head became caught between the lap and lead lever and the cylinder head located along the right side of the engine (R. 50a, Defendant's Exhibit 5, R. 143a).

The deceased had no duties to perform which required him at the time of the accident to be in any place other than the caboose, which was located behind the engine (R. 13a, 62a, 76a, 86a, 117a). The engine's whistle was blown and the bell was rung before the move from the Hastings

Fuel switch was started (R. 80a, 97a, 101a, 105a), and from that time until the time petitioner's decedent was killed, the engine and train were in one continuous movement, although the engine slipped and skidded and went backward and forward during this movement due to the grade of the main track (R. 53a, 98a, 106a, 120a).

Sunderlin, when operating the engine from the engineer's position and looking forward through the front window of the engine, could not see along the right side of the engine because of the running board located about six feet above the ground along that side of the engine (R. 50a, 119a, 120a) and even looking out of the side window of the engine, could not see the area within two or three feet of the side of the engine without leaning out the window (R. 46a, 47a).

The case was submitted to the jury in a charge and interrogatories which embodied every theory of liability advanced by petitioner at the trial (R. 145a, 146a, 159a-179a), and the jury's verdict for the petitioner was based solely on the negligence of Sunderlin in not seeing Eckenrode after their conversation (R. 145a). The jury concluded that if Sunderlin had watched Eckenrode he should have done something which would have avoided the accident (R. 145a). The jury rejected all other contentions of the petitioner concerning respondent's negligence (R. 145a, 146a). The trial judge subsequently set aside the jury's verdict, reasoning that the evidence failed to show that Sunderlin was under a duty to keep Eckenrode under observation and that there was no causal connection between the negligence found by the jury (Sunderlin's nonobservance of Eckenrode) and Eckenrode's death (R. 149a-156a). Petitioner appealed to the Circuit Court of Appeals for the Third Circuit, which affirmed, *per curiam* (R. 185). A petition for reargument in that court was granted (R. 212) and, after the reargument, the decision of the District Court was again affirmed, with one dissent (R. 213).

ARGUMENT.

At the outset, it should be noted that all of the evidence was presented by the Petitioner, with the exception of testimony concerning the operation of the engine's sanders, which is not in issue here since the jury found that the sanders were operating properly; and with the exception of photographs of the locale of the accident and the type of engine involved, the accuracy of which was not questioned. There was no dispute or conflict betweeen the various witnesses called by the petitioner concerning the manner of the happening of the accident. However, as shown below, petitioner's brief contains numerous misstatements and distortions of the uncontradicted evidence.

I. The Evidence Was Insufficient to Warrant Submission to the Jury of the Issue of Respondent's Negligence.

On the issue of negligence, the uncontradicted evidence, viewed in the light most favorable to the petitioner, presents the simple question of whether or not there was any duty on the part of respondent's engineer to continue to observe the deceased, a fellow employee, after seeing him walking along an adjoining track which was somewhat beneath the level of the track on which the engine was running and which diverged away from the track on which the engine was running.

The deceased had no duties which required him to walk along the adjoining track much less to be anywhere near the engine at the time of his accident; in fact, it was his duty to remain in the caboose while the movement which resulted in his death was being made (R. 13a, 62a, 76a, 86a, 117a). The movement was being made in broad daylight on a clear day (R. 9a, 54a, 101a), and the deceased was fully aware of the movements of the train when last observed by the engineer, since at the time of that observation he walked alongside the engine and exchanged pleasantries with the engineer. Under these circumstances, it is submitted that,

although the engineer knew that Eckenrode was not in his proper position but rather was on an adjoining track, still he had no duty to continue observation of Eckenrode, at least until he had some notice that the deceased was about to place himself in a position of peril. **Chesapeake and Ohio Ry. v. Nixson**, 271 U. S. 218 (1926).

On the question of whether or not there was evidence of negligence, petitioner's arguments are based on a series of misstatements of the undisputed evidence. The misstatements in the petition and brief, concerning the evidence of negligence, fall into three general categories which may be summarized as follows:

1. *The Stopping and Starting of the Engine and Its Mechanisms.*

It is repeatedly asserted throughout petitioner's brief that the engine and train stopped and then started and that the lap and lead lever came to a full stop and then started on a reapplication of power (Petitioner's brief, pp. 5, 9, 10, 14, 15).

The evidence is clear that the train and engine were in constant motion from the time they left the Hastings Fuel switch until the time that Eckenrode was killed. All the members of the train crew testified that the engine did not stop during the course of the push upgrade, although when the wheels skidded the train hesitated or even dropped back momentarily until traction was obtained (R. 53a, 98a, 106a). As to the movement of the lap and lead lever, the only testimony concerning it was the testimony of the brakeman, McGowan, who pointed out that when the engine skidded and stopped going forward the lever moved fast, whereas when the engine was going forward the lever moved slowly (R. 89a, 90a). Thus, the only testimony on this point is flatly contradictory to the statement or assumption made by the petitioner that when forward motion stopped the lever became motionless.

2. *The Direction in Which Eckenrode Was Walking When Last Observed by the Engine Crew.*

Petitioner asserts, repeatedly, that the deceased was observed by the acting engineer, the regular engineer, and the brakeman walking "toward" the train (Petitioner's brief, pp. 5, 6, 9).

In making these statements, petitioner makes no distinction between the testimony of the brakeman, McGowan, and the testimony of Sunderlin, the acting engineer, and Ingoldsby, the acting fireman. McGowan was located at the head of the twenty-two-car train, more than one thousand feet away from the engine (R. 78a, 14a); Sunderlin and Ingoldsby were in the cab of the engine (R. 42a, 100a). McGowan observed Eckenrode subsequent to the time Eckenrode was last seen by Sunderlin and Ingoldsby, but there was no showing that his observation was or could have been communicated to the engineer. Sunderlin and Ingoldsby both testified that when they last observed the deceased, as he walked past the engine, he was proceeding along the Hastings Fuel siding track, which ran roughly parallel to the course of the engine but diverged away from the track on which the engine was moving (Defendant's Exhibits 1, 2 and 3—R. 142a, 143a; R. 51a, 52a, 63a, 64a, 106a, 107a, 118a). Petitioner attempts to distort isolated words in the testimony of these two witnesses into testimony that they last observed Eckenrode walking toward the train, whereas their testimony was merely that he was walking *on the Hastings Fuel siding track* in the same general direction as that in which the train was running (R. 51a, 52a, 63a, 64a, 106a, 107a, 118a).

3. *The Conversation Between Eckenrode and the Acting Engineer.*

Petitioner urges that the conversation which occurred between Eckenrode and the acting engineer, as Eckenrode walked past the engine, gave notice to the engineer that

Eckenrode planned to come into proximity with the engine in endeavoring to help it up the hill (Petitioner's brief, pp. 5, 9, 11). Thus, it is stated that "deceased had specifically told the engineer that he was going to do something about moving it" (Petitioner's brief, p. 11).

The conversation between Eckenrode and the acting engineer, Sunderlin, is set forth above (supra, p. 4). A reading of the conversation leaves no doubt that it was merely a joke between the deceased and the engineer. It is submitted that the trial judge properly disposed of petitioner's contention by stating that it could not be seriously considered (R. 153a). It is not contended that the deceased made any effort to obtain a bar with which to bar the engine, or that he was hurt in barring the engine, so that the argument that the conversation put the engineer on notice that the deceased planned to do whatever he was doing when he met his death is specious. The impossibility of one man's using a crow bar to assist a locomotive in pushing twenty-two loaded freight cars up a grade is manifest.

In a similar vein, petitioner asserts that, at the time of the accident, Sunderlin, the acting engineer, knew that the deceased was no longer in the caboose but was "participating in completing the shifting move" (Petitioner's brief, p. 9). The testimony of all of the witnesses was to the effect that petitioner's duties in connection with the movement were completed when the cars were coupled, that it was his duty to remain in the caboose thereafter (R. 13a, 62a, 76a, 86a, 117a), and that, when last observed by Sunderlin, the deceased was walking away from the engine along the Hastings Fuel siding track (R. 51a, 52a, 63a, 64a, 81a, 82a, 85a, 106a, 107a, 118a).

It is accordingly submitted that the evidence in the instant case, as it actually appears in the notes of testimony rather than as it is stated in petitioner's brief, failed to

establish any facts sufficient to raise a duty on the part of the acting engineer to keep the deceased under continuous observation.

II. The Circuit Court's Decision Is Not in Conflict With the Decisions of This Court, Nor Is There an Irreconcilable Conflict and Division Among the Judges of the Circuit Court as to the Meaning of Negligence.

Petitioner asserts that the decision of the Circuit Court is in conflict with recent decisions by this Court and by the Circuit Court of Appeals for the Second Circuit (Petitioner's brief, pp. 8, 13, 16). This contention is based on the claim that the Circuit Court found the verdict for the petitioner speculative (Petitioner's brief, p. 16). However, the portion of the Circuit Court's opinion relied on to demonstrate this proposition, in the parts which are deleted from the quotations appearing in petitioner's brief (p. 16), makes it clear that speculativeness was not the basis for the decision. Thus, the court below pointed out that it was not concerned with assumption of risk or with contributory negligence (as to which, the court commented on the speculative nature of the evidence) and went on to state (R. 218):

> "What we are talking goes to the very foundation of liability. It has to do with the duty of Sunderlin, in charge of the operation of the engine, to take precautions against an experienced fellow member of his train crew acting in a wholly unexpectable and unreasonable fashion. We see nothing on which any charge against the company based upon carelessness of the locomotive's crew could possibly be sustained."

Thus, it is clear that the Circuit Court affirmed the entry of judgment for the respondent not because the verdict was speculative, but rather because of the complete absence of probative facts to support the jury's conclusion that the respondent was negligent.

The recent decisions of this Court cited by the petitioner do not conflict with the decision of the Circuit Court in the instant case in the legal principles for which they stand or in the application of those principles to the facts of the particular cases. Thus, in *Bailey v. Central Vermont Ry.*, 319 U. S. 350 (1943), it was held that the evidence was sufficient to sustain a finding of negligence because of the failure to supply a safe place to work, where there was evidence that the operation there involved could readily have been performed in a safer manner, which would have avoided the injury.

In *Tennant v. Peoria & P. U. Ry.*, 321 U. S. 29 (1944), it was conceded that petitioner's decedent was killed in the course of a switching operation and that no bell had been rung or signal given when the movement was started. There was conflicting evidence as to whether or not respondent's rules required the ringing of a bell. The principal question was whether or not the admitted failure to ring the bell was causally connected with the death of petitioner's decedent. The answer to this question depended on where the decedent was located at the time of his death, and as to this the evidence and inferences to be drawn from the evidence were in conflict. This Court, in holding that the evidence was sufficient to warrant submission of the case to the jury, merely recognized that the conflict in the evidence as to negligence, and the conflict in the evidence and inferences as to causation, should be resolved by the jury.

Lavender v. Kurn, 327 U. S. 645 (1946), is another case where it was held that the jury must resolve the conflicts in the evidence and inferences to be drawn therefrom concerning the cause of the accident. In that case, the inferences to be drawn from the evidences suggested two entirely different manners in which the accident might have happened, and this Court held that the fact that an element of speculation was involved in the jury's determining which had occurred was not a proper basis for the entry of judgment for the respondent.

In addition to these cases, petitioner cites *Myers v. Reading Co.*, 331 U. S. 477 (1947), which was merely a decision on the *quantum* of evidence necessary to show a defective appliance within the meaning of the Safety Appliance Act, and did not involve in any way the question of proof of negligence; *Lillie v. Thompson*, 68 S. Ct. 140 (1947), where it was held that it is negligent for an employer to fail to guard its employees from foreseeable criminal acts by third persons; and *Johnson v. U. S.*, U. S. (decided, February 9, 1948), which involved the question of whether or not the doctrine of *res ipsa loquitur* was applicable to a suit by a seaman for personal injuries. Thus, it is readily observed that none of these three cases has any bearing on the question of whether or not the evidence concerning negligence in the instant case was sufficient to sustain a verdict for the petitioner. The Safety Appliance Act is not involved in the instant case, there is no question of criminal action by non-employees, and it is not contended that the *res ipsa loquitur* principle is applicable to the facts of the instant case. It is submitted that the Circuit Court's decision, in the instant case, is in harmony with the recent decisions of this Court cited by the petitioner, insofar as those cases have any bearing on the questions here presented, and that, in fact, the instant case is governed and controlled by the recent decision of this Court in **Brady v. Southern Ry. Co., 320 U. S. 476 (1943)**, where it was stated (p. 479):

> "When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by non-suit, directed verdict, or otherwise in accordance with the applicable practice without submission to the jury, or by judgment notwithstanding the verdict. By such direction of the trial the result is saved from the mischance of speculation over legally unfounded claims."

This case differs from many of the cases recently decided by this Court, since, here, there was full and uncontradicted testimony concerning the actions of the deceased leading up to his death. There is no question of usurping the function of the jury, since there was no dispute between the various witnesses concerning the facts of the accident. There is no question of conflicting inferences from the testimony as to what actually happened, so that the jury's province in this regard has not been invaded. The only possible field for speculation in the instant case was speculation as to why Eckenrode placed himself in such close proximity to the engine and as to what happened in the seconds after he was last seen by the front brakeman approaching the track on which the engine was moving and before the moment when his head was struck by the mechanism of the engine. But the facts as to his movements and the engineer's knowledge of his movements were all established without contradiction, and it was on the basis of these facts alone that the jury found for the petitioner and, correspondingly, that the determination was made by both of the courts below that there was no evidence to sustain a finding that respondent violated any duty which it owed to the deceased.

Petitioner asserts that there is a conflict between the decision in the instant case and the decision of the Second Circuit in *Mostyn v. Delaware, L. & W. R. R.*, 160 F. 2d 15 (C. C. A. 2d, 1947). In that case, the majority opinion written by Judge Learned Hand clearly recognized that there cannot be negligence "in the air," and that whether or not the conduct complained of gives rise to a cause of action depends on whether or not it is negligent as to the person or class of persons who are harmed. **Palsgraf v. Long Island R. R., 248 N. Y. 339, 162 N. E. 99 (1928).** But it was reasoned that the conduct of the defendant there involved was negligent as to the plaintiff, since defendant had reason to anticipate plantiff's presence at the place

of danger.[1] As is stated in Section 281 (b), comment c, of the Restatement of Torts, which was cited with approval by Judge Hand:

> "If the actor's conduct creates a recognizable risk of harm only to a particular class of persons, the fact that it causes harm to a person of a different class, to whom the actor could not reasonably have anticipated injury, does not render the actor liable to the persons so injured."

The decision of the court below is merely an application of the principle recognized by Judge Hand in the *Mostyn* case (R. 218). The conflict asserted by the petitioner is, accordingly, illusory.

In applying, to the facts of the instant case, this principle, which was stated with such clarity by Justice Cardozo in the **Palsgraf** case and which is now codified in

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[1] In the *Mostyn* case, it was held that there was evidence of negligence to submit to the jury where it appeared that the defendant had notice that plaintiff might be asleep on the tracks and failed to maintain a proper look-out for the plaintiff. Judge Hand, in his opinion, recognized that the failure to maintain a lookout is evidence of negligence only as to persons who might be expected on the tracks, saying (160 F 2d 15, 18):

> "It might have been possible to argue, although the likelihood that men might be crossing the track was ground for raising a duty towards them, Mostyn, who lay asleep beside the track was not within the class to which that duty was owed and could not take advantage of its breach, even though he would have escaped had the duty been performed. However, Mostyn testified that two of his supervisors had suggested that the men should sleep outside; and *hence the duty was not limited to those who were crossing the track*. The jury was free to find—indeed could scarcely have avoided finding—that even the most casual lookout would have discovered Mostyn lying where he was; . . ." (Emphasis supplied.)

the Restatement of Torts, it is seen that respondent would owe a duty to persons crossing its track, if it had reason to anticipate their presence on the track, and a failure of the engineer to keep a look-out ahead would constitute negligence as to persons of such class who were run down because of the failure to maintain such a look-out. Conversely, respondent owed no duty to a flagman observed walking at the side of the engine along a roughly parallel, but divergent, track which was separated from the track on which the engine was running by an embankment several feet high, at a time when the flagman had no duties to perform in connection with the moving train. The flagman's presence close to the *side* of the engine could not be anticipated. Any failure to keep such person under continued observation, or any failure to maintain a look-out along the area in *front* of the moving engine, would not constitute negligence as to such a person. Certainly, such a conclusion is inevitable under the facts of the instant case, where it was shown, by the uncontradicted evidence, that the deceased, when walking along the adjoining track, was fully aware of the movements of respondent's train.

Petitioner asserts, as a reason for the grant of certiorari, that there is a conflict within the Third Circuit, as to the meaning of negligence, as used in the Federal Employers' Liability Act (Petitioner's brief, pp. 8, 19, 20). To illustrate this point, three decisions of the Circuit Court of Appeals for the Third Circuit are cited. The first of these, *Myers v. Reading Co.*, 155 F. 2d 523 (1946), [reversed 331 U. S. 447 (1947)], was a unanimous *per curiam* decision involving the question of the *quantum* of evidence necessary to show that a hand brake was inefficient, within the meaning of the Safety Appliance Act. The second, *Pitt v. P. R. R.*, 161 F. 2d 733 (1947), was decided by a divided court, consisting of five of the circuit judges and one district judge, and involved the questions of whether the finding by a trial judge (the case having

been tried without a jury) that a particular hammer was not a safe tool for driving nails was "clearly erroneous" within the meaning of Federal Rule of Civil Procedure 52, and whether the trial judge improperly admitted and considered expert testimony on the point, the qualifications of the expert having been attacked. The third case cited by petitioner, *Meyonberg v. P. R. R.*, 165 F. 2d 50 (C. C. A. 3d, 1947), was decided in an opinion by one of the judges of the Third Circuit, who was joined by Judge Stephens of the Ninth Circuit, sitting specially, with a dissent by another of the judges of the Third Circuit. It was not a suit under the Federal Employers' Liability Act, but rather involved the New Jersey law concerning the duty of a carrier towards passengers. Thus, the cases cited by the petitioner fail to show any conflict among the members of the Circuit Court of Appeals for the Third Circuit, much less "an irreconcilable conflict and equal division" (Petitioner's brief, p. 8) within that court concerning the meaning of negligence as used in the Federal Employers' Liability Act or concerning the question of the type of evidence sufficient to establish negligence under that act. On the contrary, none of the cases cited by the petitioner dealt with or were concerned with this question.

III. There Was No Evidence to Sustain a Finding That Any Negligence of the Respondent Caused or Contributed to the Injury.

Judgment after the verdict was entered for the respondent, in the District Court, not only because there was no evidence of negligence, but also because the evidence failed to show any causal connection between the claimed negligence (the failure to keep Eckenrode under continuous observation) and the accident (R. 154a, 155a, 156a). The Circuit Court recognized the validity of the reasoning of the district judge on this point (R. 218).

If, under the evidence, it could be held that there was any duty on the part of the acting engineer to observe the movements of the deceased after their conversation, the question of what opportunity he had to make such observation is, of course, important. It appeared that there were two windows on the engineer's side of the train, one small window in the front of the cab of the engine, and a larger window on the side of the cab (Defendant's Exhibit 4, R. 143a; R. 44a, 102a). Throughout the petitioner's brief, it is stated, in one form or another, that if the acting engineer had looked he could have observed the deceased and could have seen sand in the deceased's hands (Petitioner's brief pp. 4, 5, 6, 9, 10, 13, 15). In many of these statements, no distinction whatsoever is made between the view available to the acting engineer from the front window and the view available to the acting engineer from the side window. For example, it is stated that "concededly had the engineer maintained a look-out, he would have had the decedent within his constant full view (108a)" (Petitioner's brief, p. 13).

The uncontradicted evidence was that a person looking out the front window of the engine from the engineer's position could not see to the right of the engine, in the direction from which Eckenrode approached (R. 50a, 119a, 120a) and that a person walking along side the engine could not be observed unless he was more than two or three feet away from it (R. 46a, 47a). The portion of the testimony relied on by the petitioner in support of the statement that if he had looked the enginer would have had the decedent within his constant full view related to the testimony of the engineer as to the deceased's position, when he was found after the accident approximately five feet to the right of the track, with his feet extending on down the bank (R. 50a, 120a). It was only as to his ability to observe the deceased's body when in this position that the acting engineer stated that there was nothing to block his

view out of the *side* window (R. 107a, 108a). There was no evidence whatsoever concerning whether or not it would have been possible to observe sand in the deceased's hands from the engineer's position.

The accident in the instant case could not have occurred unless Eckenrode, in some manner, placed his head between the lever and the cylinder head, where it was crushed—in other words, he could only be hurt by putting himself into the path of the moving machinery of the engine. Merely standing alongside the moving engine or walking within a foot or two of the engine could not have caused him any injury, and observation from the front window would not have disclosed Eckenrode's presence anywhere near the side of the engine (R. 50a, 119a, 120a). Petitioner asserts that Sunderlin was driving blindly (Petitioner's brief, p. 6) although Sunderlin testified that he was looking out of the front window of the engine (R. 102a, 103a, 119a). Whether or not there was a duty to look ahead for signals, which duty could have been discharged by observation from the front window, and whether or not this duty was discharged is immaterial in a case where a person walking along the side of the engine, who could not be seen as the result of such observation, was injured.

Thus, as to causation, the question presented is merely whether or not, even if there was a duty to continue to observe Eckenrode from the side window (the only window from which he could have been observed), observation from the side window would have prevented the accident. A person walking alongside the engine could not be observed when he was within two or three feet of the engine (R. 46a, 47a). Consequently, even if Sunderlin had kept Eckenrode in view from the time of their exchange of conversation until the time that Eckenrode climbed up the bank from the Hastings Fuel siding to the main track, Eckenrode would have gone out of sight when he was still two or three feet away from the engine, and such observation would have told

Sunderlin only that Eckenrode was walking diagonally toward the engine and, when last observed, was at a safe distance from the engine. Such observation could not have prompted any action on Sunderlin's part which would have in any way prevented the injuries which ultimately resulted through Eckenrode's placing himself in a position of extreme danger, or, perhaps, through Eckenrode tripping as he walked alongside the engine.

Plaintiff urges that if Sunderlin had observed Eckenrode approaching and the engine was stopped at the time, Sunderlin should not have again started the engine while Eckenrode was approaching the engine. Of course, the evidence is completely clear to the effect that the train and engine were in constant motion from the time the engine left the Hastings Fuel switch until the time Eckenrode was killed. The fact that the throttle was opened and closed in moving the engine, due to the effect of the skidding and going upgrade, does not alter the fact that the engine was in constant motion and that only one move is involved. It was testified by all the members of the crew that the engine and train did not stop during the course of the push upgrade, although when the wheels skidded, the train hesitated or even dropped back momentarily until traction was obtained (R. 53a, 98a, 106a, 120a). Thus, any argument founded on the proposition that the train was stopped is not supported by the testimony.

It was not disputed that Eckenrode knew of the movement of the train and the engine since he had conversed with the engineer and walked alongside of the engine in broad daylight while the engine was moving. Certainly, short of actually seeing Eckenrode get down and place his head within the mechanism of the engine, the engineer could have no reason to believe that Eckenrode would place himself in such a dangerous position. There was nothing inherently dangerous about walking near the engine, and even continuous observation of Eckenrode would have shown noth-

ing more than the fact that Eckenrode was walking in proximity to the engine. Thus, there was nothing to suggest the danger of Eckenrode's position to the engineer, and Sunderlin's failure to continue observation of Eckenrode cannot be regarded as a cause of the accident.

CONCLUSION.

The respondent submits that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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